

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the Fourth Interim Fee Application (“Fourth Application”) of Simpson, Thacher & Bartlett (“STB”) attorneys for Richard C. Breeden as trustee in the consolidated case (“Trustee”). The Fourth Application seeks payment of professional fees in the amount of \$3,365,766.50 and reimbursement of expenses in the amount of \$608,804.83 incurred

during the period March 1, 1997 through June 30, 1997.¹ This Fourth Application was submitted to Stuart, Maue, Mitchell and James, Ltd. (“Fee Auditor”) in accordance with the Court’s Amended Order dated December 2, 1996, regarding Fee Applications subject to review by the Fee Auditor. The report of the Fee Auditor (“Auditor’s Report”) was filed with the Court on November 5, 1997. The Fourth Application came on for a hearing before the Court on November 18, 1997, at which time the Court awarded STB a provisional award of \$1,750,000 in fees and \$250,000 in expenses. Opposition to the Fourth Application was interposed by the United States Trustee (“UST”) and the Official Committee of Unsecured Creditors (“Committee”).

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 1334(b) and 157(a), (b)(1) and (b)(2)(A) and (O).

FACTS AND ARGUMENTS

Familiarity with the prior decisions of this Court which dealt with the first three fee applications of STB is presumed and they will be referenced herein to the extent necessary.²

¹STB adjusted its fee and expense request as reflected on Exhibit A attached to its Response to Fee Auditors Review and Analysis of Fourth Interim Fee Application dated November 14, 1997. The net adjusted fee is \$3,349,073.50 and the adjusted expense total is \$608,522.79.

²The Court entered Memorandum-Decisions, Findings of Facts, Conclusions of Law and Order dated February 5, 1997, August 13, 1997 and March 20, 1998. STB moved to reconsider

The Auditor's Report generally identifies entries in STB's time records offered in support of the Fourth Application as falling into twenty general categories which "Appear to Violate Court Guidelines." In addition, the Auditor's Report isolates approximately one hundred eleven much more specific and limited categories or tasks which it calls to the Court's attention for review and analysis.³

STB provided specific replies to the Auditor's Report in a Response filed November 17, 1997. In that Response STB indicates that it has voluntarily reduced the Fourth Application by the net sum of \$17,918 which the Auditor's Report indicated was the result of duplicate billing errors, non-billable travel and services performed for non-debtors (Hamel Employment Contract). STB has also conceded that its expenses should be reduced by \$282.04.

STB once again challenges the Auditor's Report insofar as it questions "Vaguely Described Tasks," "Multiple Attendance at Events" and "Claimed Administrative and Clerical Tasks" making many of the same observations that it has made previously in criticizing the Auditor's Reports relating to its First, Second and Third Fee Applications. Those criticisms need not be reiterated a fourth time in this decision.

With regard to the one hundred eleven more specific categories identified by the Fee Auditor which "The Court May Wish to Examine for Relevance Necessity and Reasonableness,"

the Order of August 13, 1997 and on February 9, 1998, the Court entered a Memorandum-Decision, Finding of Fact, Conclusion of Law and Order reconsidering that Order. Familiarity with that Memorandum-Decision is also presumed.

³ STB continues to refer to the Auditor's Report as "objecting" to its Fourth Application. The Auditor's Report does not, nor is it its function to, object to anything. The Auditor's Report simply analyzes STB's Fourth Application and isolates certain portions of that application for specific consideration by the Court.

STB again focuses its Reply on the Fee Auditor's highlighting of members of the firm who billed less than 20 hours during the current reporting period and those who recorded more than 12 hours in any one day during the same period. As was the case in considering the Fee Auditor's observations regarding STB's Third Application, while the former observation by the Fee Auditor may suggest "padding" of time records, the Court does not reach that conclusion. Concerning the latter observation highlighting 12 hour plus days, the Court is personally familiar with the preparation that preceded the so-called "§ 362(d) trials," the majority of which were held during the current application period, and does not find 12 hour plus days unusual during the current reporting period.

The Court does once again focus on STB's time devoted to "Vaguely Described Tasks," "Multiple Attendance at Events," "Intra Office Conferences," "Administrative and Clerical Tasks" and "Fee Applications". Having written four prior decisions dealing with each of the foregoing categories, the Court will not reiterate the basis for its adjustments except as set forth below.

Vaguely Described Tasks

Subdivided into three categories: Conferences, Research and Other. Upon an analysis of STB's time records as isolated by the Fee Auditor on its Exhibits C, D and E, as well as STB's Response, the Court makes the following adjustments:

Fee Auditor's Exhibit C - no adjustment

Fee Auditor's Exhibit D - disallow \$1,722.00

Fee Auditor's Exhibit E - disallow \$108.50

Total disallowance	\$1,830.50
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Multiple Attendance at Events⁴

As reflected on Fee Auditor's Exhibit F - disallow \$39,582

Intra Office Conferences

As reflected on Fee Auditor's Exhibit Q1 - disallow \$16,103

Administrative and Clerical Tasks

As reflected on Fee Auditor's Exhibit G-1, G-2, G-5 and H-2, specifically Exhibits G-1, Filing/Organizing/Retrieving ; G-2, Distribution of Documents/Materials; G-5, Miscellaneous Clerical Tasks and H-2, Assist in Service of Documents, combined disallowance, \$60,949.50. This disallowance represents one-third of the total fees reflected on Fee Auditor's Exhibits G-1, 2, 5 and H-2.

Fee Applications - (As reflected on Fee Auditor's Exhibits FF-2 through FF-4.)

In its February 9, 1998 Memorandum-Decision, Findings of Fact, Conclusions of Law and Order, the Court indicated that it would limit STB's fees in connection with the preparation and defense of fee applications to 3% of the total fees billed for the interim period for services related to the preparation and defense of fee applications ("3% rule"). The Fourth Application seeks total fees of \$88,702.50 in connection with STB's fee applications. Thus, the Court disallows \$86,041.42.

⁴ While the Court recognizes that the Fourth Application relates to a period of intense litigation in the case involving the so-called "bank trials," the Court also notes that during the Fourth Application period STB committed no less than 10 partners, 34 associates, 24 paraprofessionals and 4 miscellaneous personnel to the case.

Lady Kathleen

The Court will once again disallow a fee of \$14,586 which is attributable to services rendered in connection with the yacht referred to as the Lady Kathleen which the Court has previously concluded was not an asset of the consolidated estate. (Fee Auditor's Exhibit S-4)

The Court notes that both the UST and the Creditors Committee, in other opposition to the Fourth Application, have asserted certain conflicts of interest resulting primarily from STB's alleged representation of two non-debtors, Equivest Finance Inc. and Resort Funding Inc. That subsequent to the hearing on the instant Application, both the UST and the Creditors Committee have continued, if not intensified, their allegations of conflict of interest directed at both STB and the Trustee. On June 25, 1998, this Court entered an Order on motion of the Creditors Committee, and with the UST's consent, to postpone for at least sixty days the conflict issues which necessarily implicate potential denial and/or disgorgement of professional fees some of which are presumably being awarded herein. Thus, the fee and expense award made herein, as well as by virtue of the Court's Order of December 19, 1997 awarding fees provisionally on the Fourth Application, are without prejudice to the rights of either the UST, the Creditors Committee or any other party in interest seeking disgorgement of said fees and expenses at some later point in time based on alleged conflicts of interest..

With regard to the remaining objections asserted by the UST and the Creditors Committee, the Court has fully considered the same in light of STB's Response to the objections of the UST and the Creditors Committee, dated December 4, 1998 and has determined to make

no further adjustments to the Fourth Application based upon those objections.⁵

Expenses

The Fee Auditor has identified \$826.50 in travel expenses for which STB initially provided no receipts. On November 17, 1997, STB provided the Court with additional receipts which appear to support the entire requested travel expense reimbursement.

STB has once again sought reimbursement for expense items described as “Word Processing,” “Proofreading,” “Desktop Publishing,” “Overtime Transportation,” “Overtime Meals and Carfare,” “Restaurant/STB Cafeteria,” and “Conference Meals”. These expenses total \$73,314. Additionally and in spite of the Court’s prior admonition, STB seeks \$26,734.87 for “Express Mail/Messenger/Courier Service,” and \$10,121 in “Facsimile Charges”.

STB again urges the Court to consider the affidavit of Christopher A. Conroy submitted in connection with STB’s Third Application to support “overhead expenses”. The Court, however, finds no reason to change its prior position and will accordingly disallow \$73,314. With regard to “Express Mail/Messenger/Courier Service” and “Facsimile,” the Court again acknowledges the increased use of such services necessitated by the “bank trial” phase which occurred during the current application time period. Nevertheless, the Court will make an across the board disallowance of \$5,000 in an effort to again discourage the indiscriminate use of such services.

⁵ The Court notes that included within the “remaining objections” are the hourly rates of various STB partners, associates and paralegals. In not specifically addressing this objection in the instant Memorandum-Decision, the Court does not intend to preclude itself from revisiting the objection upon a final review of STB’s fees pursuant to Code §330.

In summary, the Court makes the following reductions to fees and expenses sought in the Fourth Application:

<u>Total Requested Fees</u> (as adjusted)	\$ 3,349,073.50
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Disallowances:

Vague Documentation of Services	- 1,830.50
Intra Office Conferences and Multiple Attendance at Events	-55,685.00
Lady Kathleen	- 14,586.00
Administrative and Clerical Tasks	- 60,949.50
Fee/Employment Application of STB (allowed at 3% of total)	- 86,041.42
Provisional Fee Award granted on December 19,1997-	1,750,000.00

<u>Net Total Fee Allowed</u>	\$1,379,981.08
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<u>Total Requested Expenses</u> (as adjusted)	\$ 608,522.79
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Office Overhead	-73,314.00
Express Mail/Messenger/Courier Service and Facsimile	- 5,000.00
Provisional Expense Award granted on December 19, 1997	-250,000.00

<u>Net Total Expenses Allowed</u>	\$ 280,208.79
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Based on the foregoing, it is

ORDERED that the fees and expenses requested by STB in its Fourth Application shall be disallowed as detailed above; and it is further

ORDERED that payment of the remaining balance of allowed fees and expenses, and any amount still due and owing on any prior award, shall not be made from encumbered assets of the consolidated estate.

Dated at Utica, New York

this 6th day of August 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge